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No. 95-1340

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE PROJECT ON GOVERNMENT OVERSIGHT IN SUPPORT OF RESPONDENT

CHARLES TIEFER
(Counsel of Record)
Associate Professor
University of Baltimore School of Law
1420 North Charles Street
Baltimore, MD 21201
(301) 229-0112

Counsel for Amicus Curiae
Project on Government Oversight

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Pages

Pages

Statutes:

Pages

Legislative and Regulatory Materials:

Pages

Miscellaneous:

Pages

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INTEREST OF THE AMICUS CURIAE

The Project on Government Oversight ("POGO") is a non-partisan non-profit organization that for over fifteen years has addressed -- by investigation, exposure, and formal written submissions -- waste and fraud in government spending. Its goal is to change the way the government works by revealing examples of systemic problems and offering possible solutions.

Originally named the Project on Military Procurement, the organization focused on military spending abuses. It

made outrageously overpriced spare parts, such as the $7,600 coffee maker and the $1,000 pair of pliers, household words. The organization also revealed serious inadequacies in weapons, such as the Bradley Fighting Vehicle and the Sgt. York DIVAD Air Defense Gun. In 1990, the organization changed its name and broadened its focus to include fraud and abuse in federal government spending.

In 1994-95, POGO became involved on the defense industry's unsuccessful efforts to water down the False Claims Act, which POGO considers a vital means to protect and reward whistleblowers and to return billions of dollars to the government. POGO exposed how often the defense contractors lobbying to weaken the False Claims Act had themselves paid heavily to resolve charges of fraud and abuse in their government contracting. POGO produced a survey from public records which revealed that from FY 1990 to FY 1993, over 90% of the lobbying contractors had themselves been found guilty, pled guilty or settled in civil cases for such conduct. During that time frame, these companies had paid over half a billion dollars in fines, penalties and settlements for such conduct. The appendix to this brief includes a special updated POGO study following the approach of the 1994-95 survey.

POGO's methods include formal submissions to the government forums considering important matters of government contracting. For example, earlier this year, it made a highly regarded submission to the House of Representatives regarding the Treasury's enormous losses due to shortfalls in royalty payments by oil producers. *See Valuation of Federal Oil -- Is the U.S. Getting the Royalties It is Owed?: Hearings Before the Subcomm. on Government Management, Information and Technology of the House Comm. on Government Reform and Oversight*, 104th Cong., 2d Sess. (June 17, 1996) (publication forthcoming).

POGO submits an amicus curiae brief focusing on the interaction of the False Claims Act with the statute establishing the Cost Accounting Standards disclosure system. The organization's above-described efforts frequently produce visible impact, resulting in savings to taxpayers, in the realm of measures, like the Cost Accounting Standards disclosure system, that should protect the Treasury at its points of vulnerability to cost-reimbursement contractors.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that Hughes Aircraft Company could be found liable under the False Claims Act for violating the disclosure requirement of the Cost Accounting Standards ("CAS") statute. Hughes attempts to evade its conceded "noncompliance with accounting disclosure," Pet. Br. 38, by arguing that it somehow falls outside the reach of the False Claims Act ("FCA"). Hughes is wrong for the following reasons:

First, the False Claims Act clearly does not require any showing of financial or monetary damage to the Government. (It appears from its recharacterization of the question presented that Hughes has now conceded this point.)

Second, it is clear that, in any event, CAS disclosure violations create the potential for financial or monetary injury to the Government. Under such circumstances, there is no doubt that a knowing violation of the disclosure requirement is within the scope of the FCA. While Hughes attempts to pass the disclosure requirement off as "wholly technical," the CAS Act is explicit that timely and accurate disclosure is an important "condition of contracting." Section 719 of the Defense Production Act of 1950 ("CAS Act"), Pub. L. No. 91-

379, 84 Stat. 796 (1970), *codified at* 50 U.S.C. App. § 2168 (1976).[1]

Congress imposed disclosure as a "condition of contracting" in order to protect itself from the types of injury that can result when such disclosure is inaccurate, untimely or absent. For example, contractors who violate the CAS disclosure requirement can position themselves to "game the system" by waiting to take advantage of how certain costs and certain contracts eventually play out. Moreover, contractors who violate the CAS disclosure requirement may also cause the Government to expend additional audit resources. In this case Hughes' failure to submit an accurate disclosure statement added to the government auditors' burden to determine whether Hughes had properly allocated its costs in compliance with CAS.

Finally, there is no doubt that in this case the Government has always reserved the issue of CAS noncompliance and FCA liability, despite releasing withheld funds to Hughes.

Hughes' violation of the CAS disclosure requirement denied the Government what it bargained for and created both potential and actual injury to the Government. The FCA properly applies to Hughes' claims and the decision of the Court of Appeals should be affirmed.

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[1] From enactment in 1970, through the period of the events in question, Section 719 was codified at 50 U.S.C. App. § 2168 (1976). The statutory revival of the Cost Accounting Standards Board in a new form, by Pub. L. No. 100-679, §5(b), 102 Stat. 4063 (1988), caused Section 719 to be recodified to the present location at 41 U.S.C. §422 (1994). For simplicity, reference will be to the codified section during the period in question, e.g., " § 2168(h)."

ARGUMENT

I. BECAUSE CONGRESS MADE ACCOUNTING DISCLOSURE AN EXPRESS "CONDITION OF CONTRACTING" IN THE 1970 CAS ACT, HUGHES INJURED THE GOVERNMENT BY VIOLATING THAT CONDITION IN ITS CLAIMS ON THE TREASURY.

Hughes' CAS disclosure violation warrants summarizing at the outset. Cost-reimbursed contractors like Hughes bill their customer (for pertinent purposes, the Government)[2] for their tens of millions of dollars in "direct" labor costs (as distinct from "indirect" overhead). *See* John Cibinic, Jr. & Ralph C. Nash, Jr., *Cost-Reimbursement Contracting* 660, 668 (2d ed. 1993)(direct and indirect costs). Hughes 1979 CAS disclosure statement spoke, for its Engineering Division, only of billing those costs to the pertinent contract. Thus, for labor on the B-2, it would bill only the B-2 contract, not some other contract, and vice versa.[3] Then, without Hughes amending its CAS disclosure to show a totally different accounting practice, Hughes' actual practice from 1982 to 1984 about-faced. Hughes pooled millions in such costs and billed them by formula to different contracts, fifty percent to one, and fifty percent to another. J.A. 19,111; Pet. Br. 56a; Cibinic & Nash, at 681-84 (cost pools). Meanwhile, according to allegations that must be accepted as true in the procedural posture of this

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[2] Hughes was a subcontractor on the B-2 and other projects, but the CAS Act and related obligations apply to a subcontractor the same as to a prime contractor.

[3] "Prior to 1984 [Radar Systems Group] had three (3) separate Disclosure Statements; Group Office, Non-Manufacturing [i.e., Engineering] Division, and Manufacturing Division. . . . There was no provision for the allocation of *development* costs between contracts in the Non-Manufacturing Division Disclosure Statement." J.A. 110-11 (emphasis in original).

case, Hughes instructed its supervisor, the relator Schumer, not to discuss this, while Hughes kept the prime contractor, Northrop, in the dark. Hughes' million-dollar claims on the Treasury, submitted in fraudulent violation of the CAS disclosure statute, were false claims.

After nineteen months of CAS nondisclosure, Northrop awoke, called in the auditors, and, in subsequent years, the auditors criticized Hughes sharply and repeatedly for CAS disclosure noncompliance.[4] Schumer, an insider who refused to participate in Hughes' wrongdoing, now stands ready to prove the elements of False Claims Act liability. The unanimous panel of the Court of Appeals soundly concluded that Hughes' motion for summary judgment failed to demonstrate the absence of disputed issues of material fact regarding Schumer's FCA cause of action for the CAS disclosure violation. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Appreciating why Hughes' claims were false claims requires analyzing the error in Hughes' insistence that its CAS disclosure violation cannot possibly be the slightest bit injurious to the fisc. This requires analyzing the CAS statute requiring disclosure, since, as with any statutory issue, the proper place to start is the text of the statute itself, and the meaning the law attaches to that text. In 1970, Congress created the CAS system by section 103 of Pub. L. No. 91-379, codified at 50 U.S.C. App. § 2168 (1982).[5] The CAS Act established the CAS Board and directed it to "promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under federal contracts." 50 U.S.C. App. § 2168(g)(1982).

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[4] Hughes was "not in compliance with its disclosure statement." Pet App. 66a. The government noted Hughes' "RSG's noncompliance with its disclosure statement." Pet. App. 68a.

[5] The Government specifies that express condition by contractual clause as well as by public law.

That act's text brings us into the modern cost-accounting world, beyond the original 1863 False Claims Act's stories of cheating on simple goods like horses and horsefeed. Whereas the government makes acquisitions of well-defined goods and services by advertisement for sealed bids, it uses "negotiation" to make acquisitions too sophisticated for such precise specifications and simple price comparisons. Moreover, starting in World War II, and especially in the era of high technology weaponry epitomized by the aerospace research and development in this case, the government's defense contracting has relied heavily on cost-plus contracting. This method of contracting relieves the contractor of any risk by paying the contractor's costs, as reported pursuant to the contractor's cost-accounting practices, plus profit. Cibinic & Nash, *supra*, at 3-7 (historic background). Because the contractor's own accounting practices determine what gets claimed as "costs" for the Government to pay, it is critical that the Government know those practices in advance of contracting — just as the buyer in an international transaction must know in what currency the seller will require payment. If the seller could unilaterally switch currencies at a late date, the buyer would possibly find herself the loser, however legitimate the ultimate choice of currency.

Negotiated cost-reimbursement thus offers contractors a long-term arrangement with the goose that lays the golden eggs, namely, a guarantee from the Treasury for their cost claims. However, absent proper compliance by such contractors with the statutory requirements for, and, above all, the express conditions upon, those guaranteed cost claims, these contractors would have their hands on an uncontrolled spigot out of the Treasury. "Experience has shown 'cost-plus' contracts to be worse than worthless in the effort to prevent excessive costs." *Lichter v. United States*, 334 U.S. 742, 762 (1947). "The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage . . . of imposing a heavy burden of auditing upon the Government . . . ." *Id.*

From World War II to the 1960s, Congress tried "renegotiation" as a method to protect the Treasury, *see id.*, without notable success; from the inadequacy of "renegotiation" arose the CAS Act.

The CAS Act does not confine contractor accounting practices to some uniform pattern. Rather, it lets contractors largely choose their own practices and still get guaranteed Treasury payment of costs plus profit -- conditioned upon disclosure. The CAS Act simply employs "the authority of Congress to impose, as a condition of doing business with the Government, a requirement that contractors disclose all of their cost" accounting practices, *Bowsher v. Merck & Co.*, 460 U.S. 824, 836 n.6 (1983) As the Act states:

> The [CAS] Board is authorized to make . . . regulations . . . . Such regulations *shall* require defense contractors and subcontractors as a *condition* of contracting to *disclose in writing their* cost-accounting principles . . . .

§ 2168(g)(1982)(emphasis added). The Congress that enacted the CAS Act recognized that cost-reimbursed contractors billing the Government by practices they thought quite acceptable took $2 billion more than Congress thought they should.[6]

Each phrase in the CAS text expresses an important point. At the outset, the disclosure section of the Act recognizes that contractors will still have "*their* cost-accounting principles," i.e., individualized practices not prescribed in standards. In other words, contractors will still have a wide variety of practices, just as before the Act, many of them acceptable so long as timely disclosed.[7] Congress added the

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[6] S. Rep. No. 890, 91st Cong., 2d Sess. (1970)("*Senate CAS Report*"), *reprinted in* 1970 U.S.C.C.A.N. 3770, 3772.

[7] For some contractors, "their" practice may be to bill costs to particular contracts (the technical term is "benefitting" contracts), and other contractors can pool and allocate by formula, a percentage to this contract, and a percentage to that one -- so long as all disclose early. This case exemplifies how Congress let contractors have "their" own cost-accounting practices on such matters. As far as the CAS Act left it, under Hughes' 1979 CAS disclosure statement, Congress let Hughes' Engineering Division follow its disclosed practice of billing direct labor costs to benefitted contracts, while, pursuant to that same statement, Hughes' Manufacturing Division could follow its practice of pooling the costs and then allocating by formula.

statutory direction to "*disclose in writing*" (what this brief refers to by the precise phrase "CAS disclosure compliance") exactly what "their" practices are.

"Disclose in writing" under the CAS act anticipates a formal system of disclosure, not whatever a contractor like Hughes might cite after its CAS disclosure noncompliance is discovered. This Act's text makes strikingly clear that Congress by public law — not by some fine-print procurement specification — expressly prescribed what Hughes failed to do: "disclose in writing." To "disclose in writing" forces contractors like Hughes to fix, firmly and visibly, at an early point in time and in a form ideal for use later in auditing, "their" practices. This disclosure is aimed at precluding an array of contract-negotiating and cost-reporting accounting maneuvers thereafter. That is, disclosure constrains these risk-free, profit-guaranteed Government contractors in their accounting maneuvers and techniques. Without timely disclosure, such contractors can submit (as the GAO warned in persuading Congress to enact the CAS disclosure condition) claims to the Treasury that obtain more than a risk-free, profit-guaranteed contractor should, while wasting the Government's thin-spread auditing resources.[8]

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[8] In 1968, by Act of Congress, the Comptroller General was directed to pave the way for what became the 1970 CAS Act. Congressional Quarterly, *1968 Almanac* 406 (1969). He did so through his crucial testimony at the hearings underlying the 1970 Act, *Extension of the Defense Production Act and Uniform Cost Accounting Standards: Hearings of the*

Moreover, by the statutory words "shall require," Congress made the CAS disclosure system an ineluctably ironclad mandate. The Defense Department, the Treasury, and the auditors were not the source of the requirement that Hughes violated. They could not have approved Hughes' noncompliance even if they wished. Congress' words "shall require" dictated otherwise. This section thus does not forbid merely the limited category of universally wrong accounting practices, e.g., such CAS-standard violations as bidding costs on one basis and charging on another, or charging private commercial contracts' costs to public contracts. Rather, and more importantly, the CAS Act requires that contractors like Hughes "shall" fix visibly and firmly "their" practices, even -- especially -- practices for tapping the till that might not otherwise be universally wrong.

"*[C]ondition* of contracting" is the most important phrase in the CAS disclosure provision. Congress codified that term of art of contract law, known as the most potent tool in the drafter's lexicon. The legislature dramatized how injured the Government is if these non-riskbearing contractors fail -- even inadvertently -- to "disclose in writing their cost-

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Subcomm. On Production and Stabilization of the Sen. Comm. On Banking and Currency, 91st Cong., 2d Sess. 171-72 (1970)(*"Senate CAS Hearings"*), and by his classic 1970 report, Comptroller General of the United States, *Report on the Feasibility of Applying Uniform Cost-Accounting Standards to Negotiated Defense Contracts* 114 (Jan. 1970) (B399995(1))("The principal features of any disclosure requirement might well be directed toward . . . preventing significant changes in contract costing without notice to, or approval of, the Government.")(reprinted as House Committee on Banking and Currency, 91st Cong., 2d Sess., *Report on the Feasibility of Applying Uniform Cost-Accounting Standards to Negotiated Defense Contracts* (Comm. Print 1970))(*"GAO CAS Report"*); *id.* at 118 ("We believe further that a solution to many of these problem areas could be achieved if the contractors were to disclose their underlying cost-accounting standards and techniques . . . .").

accounting principles."[9] Because the CAS Act uses the term "condition," this is an "express" condition. Moreover, in every CAS-covered contract, the contractor, like Hughes, agrees to that condition by the CAS contract clause echoing the Act.

Almost every contracts book teaches the "Distinction Between an Express Condition and a Promise," John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11-9, at 445 (3d ed. 1987) (section heading), namely, "if B does not literally perform (and his performance is not excused), A will not be obliged to pay." *Id.* at 445. It does not matter whether by B's (Hughes') definition, or the definition of someone other than the Government, A (the Government) should be deemed well off without compliance with that particular express condition. The buyer demanded, as an express condition before payment, that condition and the seller agreed. Hence, the seller's right to payment is, literally, only conditional. The statute and the contract pronounce Hughes' violation of the condition (and its claim for payment despite the violation) as clearly injurious to the Government. Moreover, failure to fulfill an express condition invokes "the rule of strict compliance with an express condition," Calamari & Perillo at 448, especially in government contracting, in which the rule of strict compliance applies with particular vigor.[10]

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[9] Even the following of the uniform CAS standards is not a "condition of contracting," for Congress reserved that uniquely potent contract law term, "condition," with all its meaning about how much importance the Government places on this point, to the duty to "disclose in writing" their practices.

[10] *Radiation Technology, Inc. v. United States*, 177 Ct. Cl. 227, 366 F.2d 1003 (1966)(rule of strict compliance rule in government supply contracts); Donald P. Arnavas & William J. Ruberry, *Government Contract Guidebook* at 16-8 (1994) ("the Government is entitled to insist on strict compliance"); *cf. Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc.*, 259 F.2d 137 (2d Cir. 1958)(strict compliance with express conditions in private contracts), *cert.denied*, 358 U.S. 946 (1959); *Jacob*

Turning to the False Claims Act, Hughes concedes, as it must, that this Court's precedents make a contractor's claim, like Hughes', a false claim even without proof of the government's "specific damages." Pet. Br. at 42 (quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 152-53 (1956)). As Hughes says, "[p]roof of specific damages is unnecessary to establish liability under the FCA . . . ." *Id.* Absent any requirement of specific damages, Hughes devotes this portion of its argument to creating an FCA requirement that Hughes calls the "injury" requirement.

The remaining sections of this brief will address the error of Hughes, focusing on the CAS perspective, that the fraudulent noncompliance with CAS disclosure by Hughes "could not have resulted in any improper request for payment," *id.*, that is, could not have rendered Hughes claims "false claims." At the outset, it warrants noting how closely Hughes' contention matches a contractor argument about CAS disclosure soundly rejected for over twenty years. In the earliest days of CAS, cost-reimbursement contractors like Hughes tried without success to restrict government remedies for CAS disclosure violations to some lightweight "sole remedy."[11] The CAS Board from its earliest days of implementing the Act confirmed that by making the clause about disclosure in writing a "condition of contracting," Congress prescribed "that breach of any of the requirements of this clause would be a breach of a *material condition* of the contract." 37 Fed. Reg.

& Youngs v. Kent, 230 N.Y. 239, 129 N.E. 889 (1921)(Cardozo, J.) (excuse from strict compliance possible for implied but not express conditions).

[11] When the CAS Board promulgated the disclosure form and the accompanying regulations, it noted the comments of contractors:

> Many commentators urged that the requirement to repay increased costs to the United States should be deemed the sole remedy for a refusal or failure to comply with the requirements of the contract clause.

37 Fed. Reg. 4139, 4142 (1972).

4139, 4142 (1972)(emphasis supplied).[12] The audit manual and the commentators emphasize that it is a "condition."[13] Hence, the commentary warns of liability under the "False Claims Act" for "[a] contractor that knowingly or wilfully falsifies or conceals a material fact in the Disclosure Statement." Lane K. Anderson, *Accounting for Government Contracts: Cost Accounting Standards*, §6.05, at 6-30 (1996).

Hughes' contention that its fraudulent cost-reimbursement submissions cannot become "improper request[s] for payment," Pet. Br. at 42, by CAS disclosure violation, is nothing new. Rather, it is merely the version in the cost-reimbursement context of the meritless argument in other contexts that the Government has no basis to complain of a false claim, even when the contractor fraudulently deprived the Government of what it conditioned its contract upon, when the contractor gave it a substituted product "as good." Something has to set the standard against which to measure a false claim: either the contractor's rationalizations in retrospect, or, beforehand, the public law and the con-

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[12] The Board answered the argument just quoted:

> In view of the fact that breach of any of the requirements of this clause would be a breach of a material *condition of the contract*, the default clause generally applicable to performance of the contract provides adequate coverage.

Id. (emphasis added). The default clause, 48 C.F.R. 52.249-8 (1996), has as subsection (a)(3) that "The Government may . . . terminate this contract in whole or in part if the Contractor fails to — (iii) Perform any of the other provisions of this contract . . . ."

[13] *E.g.* Defense Contract Audit Agency, *DCAA Contract Audit Manual* sec. 8-104.1, at 808 (1996)("*DCAAM*")("condition"); Cibinic & Nash at 633 ("condition"); Arnavas & Ruberry at 5-20 ("condition"); Lane K. Anderson, *Accounting for Government Contracts: Cost Accounting Standards*, 6-2 (1996) ("condition"); Gene Perry Bond & Tara Harvey, *The Cost Accounting Standards: Compliance Disputes and Proposed CAS Transfer Legislation*, 13 Pub. Cont. L.J. 211, 214 (1983)("condition").

tract conditions. The courts have always chosen the latter.[14] When a fraudulent contractor faces a false claims suit, the test of whether the contractor deprived the Government of what it bargained for, derives from the statute and contract that define the Government's conditions, not from Hughes' post-hoc mitigation notions. This is not broadening the FCA; this is simply applying the language of the FCA and the courts' settled FCA precedents to the context of the CAS disclosure statute.

II. CONGRESS'S 1970 STATUTORY CONDITION PROTECTS THE FISC AGAINST ACCOUNTING NONDISCLOSURE LIKE HUGHES', APART FROM WHETHER THE PRACTICES THEMSELVES WOULD OTHERWISE BE ACCEPTABLE; CONTRACTORS FRAUDULENTLY VIOLATING THAT CONDITION MAKE FALSE CLAIMS.

A. The 1970 Condition Protects the Fisc From the Possibilities for Contractors Like Hughes in Accounting Nondisclosure, Apart from Whether the Practices Themselves Would Be Otherwise Acceptable.

Hughes admits noncompliant accounting practices can support FCA liability, but argues that "the court [of appeals] erred by holding that noncompliance with accounting *disclosure*" can invoke the same FCA liability as a violation in "the underlying accounting practices." Pet. Br. 13. Cost-reimbursement contractors' claims can be false claims by fraudulence in disclosure as much as by fraudulence in practices. Hughes makes false claims when its violations impose

[14] *See, e.g., United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972); *United States v. National Wholesalers*, 236 F.2d 944 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957).

loss or exposure to loss upon the Government in various ways discussed in this section and the next. The words and purpose of the CAS statutory disclosure condition belie Hughes' notion that Congress' goal was only to oppose unacceptable accounting practices such as double billing or misallocation of pooled costs to the wrong ("unbenefitted") contracts.

Rather, Congress' goal concerned timely disclosure of *all* practices, even those that would be otherwise acceptable. Congress expected the CAS Act to restrain cost-reimbursement contractors in "the selection of differing but generally accepted cost accounting methods," which "can produce a variance of at least 5 percent in estimating the cost of a contract . . . [sometimes] much larger." *Senate CAS Report* at 3770. CAS disclosure would end the situation that "Contractors are free to pick and choose the cost accounting method most advantageous to them." *Id.* at 3771. The GAO's report concluded, under the heading "*NEED FOR DISCLOSURE*" (capitalization and emphasis in original): "Underlying many of the cost-accounting problems we observed is a need for a written agreement [[15]] of cost-accounting practices to be followed by the contractor." *GAO CAS Report* at 19. Comptroller General Elmer Staats testified: "Properly administered cost-accounting standards, together with a written disclosure by the contractor of his cost-accounting practices, could do much to promote a common understanding as to the methods

[15] In context, it is plain that what the Comptroller General called an "agreement" is what statutorily became the CAS condition to "disclose in writing" and in practice became the CAS disclosure form, prepared by the contractor but, absent intentional concealment on areas of dispute, subject to resolution of disagreement and hence of becoming like an "agreement." *See GAO CAS Report* at 131 (GAO questionnaire about "using advance agreements on accounting standards"), 268 (response: "This is simply good business. An agreement in advance should prevent numerous questions arising later and should save time for both the contractor and the Government.").

of cost determination to be used consistently." *Senate CAS Hearings* at 11.

At this stage, it is taken for purposes of whether the defendant can obtain dismissal that Hughes submitted its noncompliant CAS disclosure violation knowingly rather than having it occur inadvertently. Hughes raises only the issue of what it calls "injury," not what the record reveals about Hughes' motives. The record has prominent indicators that Hughes saw possibilities to advantage itself by its nondisclosure. After all, in 1982, Hughes did not follow the procedure in the CAS act available for resolving a legitimate contractor question about CAS disclosure: "a dispute under the contract dispute clause." Sec. § 2158(h)(1)(1982). Hughes could have, but did not, formally present the position in 1982 that on some legitimate basis it questioned whether its practice had to be CAS-disclosed. The company did not follow that procedure in 1982, in 1983, nor in 1984. In 1984, as discovery of its practice loomed, Hughes made no defense of any supposed or possible legitimate right not to make a CAS disclosure. Rather, nineteen months late, it made a CAS disclosure amendment. The amendment itself, in the circumstances, was tantamount to an admission of the violation. Additionally, "in 1983 [William J. Schumer's] supervisor . . . instructed him not to inform the contractors," Pet. App. 4a, of the accounting practice. Moreover, as the Court of Appeals dissects precisely, Hughes kept Northrop in the dark; that is why Northrop called in the auditors. Pet. App. 19a-20a (discussing Northrop's 1986 "white paper" that said Hughes' practice was "unilaterally implemented with no customer participation").

The fact that Hughes did not present, as a legitimate dispute, its decision to engage for nineteen months in CAS nondisclosure, coupled with its concealment instruction to Schumer and its proceeding without Northrop's participation, more than creates the issue of fact on remand about Hughes' knowing noncompliance. Rather, Hughes' knowing with-

holding of CAS disclosure underscores the possibilities for advantaging itself.

Hughes' position has been, until pinned down formally, that it could freely "elect" whether to charge its costs wholly to one contract, or to charge part to one, or to charge part to another,[16] a position consistent with Hughes' defense of its accounting practice, but quite at odds with the CAS disclosure condition. This joins the other record evidence about how Hughes used the nineteen months it obtained improperly by CAS nondisclosure to make use of delaying its supposed right of "election." At one point "[t]he B-2 program would have borne all costs," J.A. 136; at another, "the McDonnell Douglas (F-15) subcontract was proposed, evaluated, and negotiated as a stand alone effort," J.A. 31, meaning the F-15 program would "stand alone" bearing all its costs.

Fraudulent delay about informing of the Government and prime contractors, particularly about a practice that would let Hughes "elect" who and what to charge, gives the cost-reimbursement contractor undue power vis-à-vis the Treasury. What injures the Government is fraudulently depriving it of what CAS disclosure establishes, the firm and visible fixing of the practices. Hughes' route to enrichment is as simple as any other game in which a player discloses to others its power to "elect" the placement of its accounting bets nineteen months after the last proper moment to do so — even apart from the propriety of the placement of those bets if timely-

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[16] "Since the dual CPU was required for the B-2, Hughes could have *elected* to charge the costs associated with that effort entirely to the B-2 cost reimbursement type subcontract." Defendant's Fact No. 107, at 185, in Def. Rep. to Pl. Oppo. to Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Judgment, March 2, 1992, Docket No. 226. J.A. 9 (emphasis supplied).

made. For example, Hughes obtains an invaluable advantage in negotiating by fraudulently delaying that disclosure.[17]

More generally, the Court of Appeals noted that Hughes' "noncompliance with the CAS may have rendered the costs unallowable under 48 C.F.R. § 31.202-2(a)(3) which requires that `standards promulgated by the CAS' be considered in determining allowability of costs. *Id.*" Pet. App. 25a. Bribes and kickbacks to interfering officeholders might get the job done faster and might be, in cost-accounting parlance, readily "allocable" to the particular ("benefitted") expedited project, but though the contractor might deliver a product satisfying contract specifications — and such costs would meet some criteria of allowability — such costs do not meet all the criteria of allowability and their submission by a contractor like Hughes would support an FCA case.[18] Hence, auditors looking at one set of noncompliance issues may deem contractors' accounting to have, on some criteria, "saved the government money," App. 4a, without those auditors themselves, let alone the Court of Appeals or any other court, considering the contractor to have established the claimed costs' allowability by the other criteria, such as by what Congress makes an express

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[17] A contractor like Hughes can negotiate a high price on a contract like the F-15 by having an unamended old 1979 CAS disclosure statement that accords with its stance (the "stand alone" stance) that Hughes' F-15 contract, as a benefitted contract, bears full pertinent costs. Hughes' claim of a supposed power to "elect" what share of pooled costs the F-15 will bear becomes clear in CAS disclosure terms only when Hughes ends its noncompliance and announces pooling after nineteen long months. Hughes' advantaging traces much more to the lengthy disclosure violation than to the practice itself.

[18] *See, e.g., United States v. Acme Process Equipment Co.*, 385 U.S. 138, 144-48 (1966); *FMC Corp. v. United States*, 853 F.2d 882, 886 (Fed. Cir. 1988)(holding legal fees unallowable on one particular CAS allocability issue, though they may well meet other criteria for allowability and may even be payable out of another contract).

condition, that is, the CAS disclosure condition.[19] The Government does not endow cost-reimbursed contractors with a Midas touch to turn anything in their hands into Treasury payments, while picking and choosing with impunity which conditions of contracting the contractor will adhere to. In fact, the Court of Appeals properly cited the law known as the "Allowable Cost Reform Act," that expressly links different tests of allowability and the FCA.[20] The Court of Appeals also properly discussed the tie between adequacy of disclosure to Northrop and the criteria of allowability. Pet. App. 15a n.2 & 19a.[21]

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[19] Hughes seems to imply the CAS system allows contractors to buy off, or to pay off, the government for a CAS noncompliance by savings or payments some other way. As could be expected from the strong wording of the CAS Act, this is anathema. CAS noncompliance adjudication started with this ringing affirmation, in "[t]he first decision handed down by a board of contract appeals involving cost accounting standards," Paul M. Trueger, *Accounting Guide for Government Contracts* 252 (9th ed. 1988): "We emphatically disagree with appellant's assertion that a contractor has a right to refuse to comply with Cost Accounting Standards" by compensating the Treasury; "[a] motorist acquires no right to park his automobile on the sidewalk by continuing to pay the fines prescribed for so doing." *AiResearch Manufacturing Co.*, ASBCA No. 20998, 76-2 BCAS 12,150 (1976). "Under the Cost Accounting Standards clause, the contractor undertakes an affirmative obligation, inter alia, to comply with all Cost Accounting Standards in effect," *id.*; *accord*, Trueger, *supra*, at 252.

[20] In that statute, Congress made clear that such FCA liability could ensue for costs "specified by statute or regulation as being unallowable," Pet. App. 15a, apart from whether they pass muster by some other criterion such as the one Hughes trumpets. The Court of Appeals rightly cited this "Allowable Cost Reform Act." Trueger, *supra*, at 506 ("Allowable Cost Reform Act"); Cibinic & Nash, *supra*, at 1146. The Allowable Cost Reform Act is cited just as another indicator of how seriously Congress takes the FCA as a remedy for allowability criteria, not as applying to Hughes claims in this case.

[21] Hughes concedes its issue about the timing of presentation of issues to the district court does "not [relate] to [Schumer's] challenge to the ade-

B. The CAS Act's Disclosure "Condition of Contracting" Protects Another Fiscal Interest: Effectiveness of Audits.

As even Hughes admits, the gravamen of a "false claim" is the Government's exposure to a possible loss of a financial or fiscal nature. See Pet. Br. at 39 ("financial loss"), 40 ("pecuniary or property loss"), 43 ("injury to the public fisc"). For example, in the classic FCA cases of product substitution or attempted bilking, the gravamen is the Government's loss or exposure from the contractor's false claim, including the Government's effort to prevent or minimize loss. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The contractor who fraudulently substitutes other types of parts in a plane than the ones the Government purchased need not have opportunities to advantage itself to be making a false claim. It suffices that the Government suffers loss, such as the dissipation of inspection effort.

The CAS statute protects, and Hughes' violation impaired, a vital Government interest in the struggle against fiscal exposure and loss: protecting the Treasury by making audits effective. This Court said in the cost-reimbursement context, "The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage . . . of imposing a heavy burden of auditing upon the Government . . . ." *Lichter v. United States*, 334 U.S. 742, 762 (1947). The authoritative Comptroller General report underlying the CAS act, previously cited, drew upon the extensive painful failure of auditing in connection with the Renegotiation Board and related efforts. Contractors who were not required to make prior disclosure of their accounting practices dissipated the government's limited auditing resources. The Comptroller

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quacy of Hughes' disclosure to *Northrop*, *see id.* at 19a-22a." Pet. Br. 45 n.18. Because Hughes appears to have had one unified nondisclosure, the discussion in this brief would apply regardless of any such distinction attempted by Hughes.

General in his testimony and his report persuasively stated the way to salvage the government's fisc-protecting resources from a "myriad of controversies."[22] That is, Congress must condition contracting upon disclosure in writing by contractors like Hughes of their accounting practices. Otherwise, dissipation of government auditing resources could result even from undisclosed practices said to be acceptable and even good for the Government. "Contractors should be required to maintain records of contract performance costs in conformity with cost-accounting standards and any approved practices set forth in a disclosure statement . . . ." *Senate CAS Hearings* at 14 (testimony of Comptroller General). Absent this, "[m]eaningful audits of negotiated contracts by the Government agencies and GAO are thus rendered more difficult." *Id.* at 12.[23] Others explained why contract auditing and administration were almost hopeless without the tools, like disclosure, in the CAS Act.[24]

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[22] Distilled from a review of scores of case studies of contract controversies of auditing and litigation, a GAO summary concluded:

> [I]t is widely recognized - and past experience indicates - that the "submerged" portion of the problem is very substantial and sizable. For each problem that reaches the [Armed Services Board of Contract Appeals] or the courts, there are, partly because of the time and expense involved in resolution by judicial or quasi-judicial bodies, *myriad of controversies* which are settled based on one party persuading the other or through negotiating. . . . [H]owever, these settlements lack continuing commitment.

Senate CAS Hearings at 171-72 (emphasis supplied)(reproducing GAO report segment).

[23] Mr. Staats endorsed the bill that became the CAS Act because "Written disclosures would do much toward achieving consistency between the cost-accounting support for the price proposal and accumulation of subsequent cost information on contract performance cost." *Id.* at 15.

[24] The legendary Vice Admiral Hyman G. Rickover, architect of the nuclear submarine program, explained:

Hughes' case fits what the GAO meant by the injurious controversy-generating nature of undisclosed contractor accounting practices. In 1984, the prime contractor, Northrop, seeing its costs escalate unexpectedly, "requested a government audit of Hughes' accounting practices," Pet. App. 3a, before Hughes ended its nineteen-month fraudulent nondisclosure period and filed its July 1984 amendment of its CAS disclosure form. Hughes' failure to disclose thereafter drew down substantial government auditing resources. The Air Force Audit Agency completed the first audit in June 1986; subsequent Defense Contract Audit Agency ("DCAA") audits and related technical reviews from 1986 to 1988 concluded, as the Court of Appeals noted, that Hughes' practices "had not been reflected properly in accounting disclosure statements. As a result, the government withheld payment to Hughes of approximately 15.4 million in costs charged to the B-2 program." Pet. App. 3a.[25] What the DCAA sharply criticized was one of the prime categories of CAS disclosure noncompliance prominently addressed in the DCAA's manual and the commentary.[26]

As a result, the Air Force requested another DCAA review in September 1990, reminding "that the contractor was

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> We negotiate every day with the cards stacked against us. Defense companies are able to hire large numbers of experienced, highly skilled lawyers and accountants; these are faced by a very few, relatively inexperienced people in government who must look after the government's interests.

Id. at 498, 500.

[25] This suspension occurred December 10, 1987. A June 1990 Air Force letter reaffirmed that Hughes had not made an adequate CAS disclosure. (Pl. Sep. Statement of Material Fact, re Fact No. 90, at 155-, J.A.8.)

[26] *DCAAM* at 8-302.2.2(8), at 815 ("**Types of Noncompliance** . . . . (8) Actual practices of accumulating or reporting costs not in compliance with Disclosure Statement.")(bold in original); Cibinic & Nash at 1063 (quoting from earlier *DCAAM*).

in conflict with their disclosed accounting practices . . . ." J.A. 110. After several more DCAA efforts, in October 1991, Hughes filed a formal claim for the suspended $15.4 million, starting the formal dispute clause process under the Contract Disputes Act. J.A. 174. Hughes could, and presumably would, have appealed an adverse determination to the Armed Services Board of Contract Appeals.[27]

This long sequence of Government audits and claims controversy is precisely what the CAS Act disclosure "condition of contracting" intended to prevent. It would fly in the face of the False Claims Act for Hughes to argue that it can fiscally injure the Government without FCA liability so long as Government's loss occurs without corresponding gains going into the pocket of Hughes itself. Rather, Hughes argues that using the False Claims Act to enforce the Cost Accounting Standards condition is not "[c]onfining the FCA to its proper realm" of protecting the Treasury but rather is using the FCA "to enforce the statutory and regulatory rights of the United States across the board," such as for "'Nuclear Waste Policy.'" Pet. Br. at 41 & n.24 (quotation omitted). Perhaps cost-reimbursement contractors feel they have such a vested property interest in their potential claims on the Treasury that audits strike them as a fiscally irrelevant "regulatory right[] of the United States." The picture Hughes would seemingly draw is that Senator Proxmire, the fiercely Treasury-guarding chief sponsor of the CAS bill,[28] established the accounting disclosure condition, not in the FCA's "realm" of protecting the Treasury from government contracts, but for some policy goal of the general "statutory and regulatory rights of the United States" far from where the money is. This

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[27] *See generally General Motors Corp. v. Aspin*, 24 F.3d 1376, 13769, 1382-83 (Fed. Cir. 1994)

[28] For Senator Proxmire's role, see *Senate CAS Report* at 2. For the significance of sponsors, *see* Charles Tiefer, *Congressional Practice and Procedure* 240-42 (1989).

Court, well acquainted with Senator Proxmire's "Golden Fleece Award" of the CAS Act era (see *Hutchinson v. Proxmire*, 443 U.S. 111 (1979)), need not read his CAS Act as a fiscally-uninterested, Treasury-unrelated effort at regulation for general societal betterment.

III. HUGHES ERRS THAT THERE IS NO FALSE CLAIM FROM ITS SO-CALLED "WHOLLY TECHNICAL" VIOLATION, WHEN THE NINETEEN-MONTH DURATION, SERIOUSNESS, AND LARGE SCALE OF HUGHES' CAS NONDISCLOSURE SHOW IT TO BE PARTICULARLY INJURIOUS.

As shown by the Project on Government Oversight survey of public records in this brief's appendix, contractors like Hughes and amici have had plenty of reason to seek legislative watering-down of the False Claims Act, from past experience with the remedies for fraud and abuse in government contracting. The amici represent two industries: the health care industry which has paid over a billion dollars since 1994, and the defense industry which has paid over eight hundred million dollars since 1994, in FCA judgments and settlements and related matters.[29] Although Congress has made adjustments of the CAS system, these do not include what Hughes

[29] In January 1995, amicus curiae published a revised update of a 1994 special study. Project on Government Oversight, *Survey of Defense Contractor Signatories of the "Position Paper: Reform of the Federal Civil False Claims Act": A Partial Listing of the Fines and Settlements Paid for Fraud, Waste and Abuse in Government Contracting* (1995). The study surveyed 22 defense contractors, including Hughes, who were signatories of a submission to Congress entitled "Reform of the Federal Civil False Claims Act Position Paper." Neither the 103d nor the 104th Congress made the changes in the False Claims Act sought by those signatories. The report in the appendix follows the methodology of that 1995 study.

and amici seek in this case.[30] There is little need to dwell on the centrality for False Claims Act purposes of Hughes' certification that its disclosure statement was "complete and accurate," J.A. 17, or the countless clear warnings that such certification must be kept current and that when its practices changed in 1982-84, it must amend.[31]

Predictably, Hughes downplays the injurious characteristics of its CAS disclosure noncompliance as "wholly technical," and tries analogizing its case to *United States v. Data Translation*, Inc., 984 F.2d 1256, 1261 (1st Cir. 1992)(Breyer, J.)(in which "no reasonable person . . . could have believed that the Government really wanted," *id.* at 1261, the disclosure alleged in the suit to be required). However, Hughes committed a violation long in duration, serious in effect, and large in scale. Addressing duration first, the Court of Appeals accurately stated of Hughes' fraud that "for the period from December 1982 to [the Hughes CAS amendment for the period ending in] 1984" -- a CAS amendment filed in July 1984, J.A. 111 -- "Hughes violated the CAS by failing to state accurately in its disclosure statement its practice . . . ." Pet. App. 25a.[32] This was a nineteen month period.[33]

[30] In the Federal Acquisition Reform Act ("FARA"), enacted as Division D of Title VIII of the 1996 Defense Authorization Act, Pub. L. No. 104-106, section 4205 exempted commercial item contracts from cost accounting standards. The research and development contracts of Hughes in this case could not be further from commercial items.

[31] *See, e.g.*, American Institute of Certified Public Accountants, *Audits of Federal Government Contractors : Audit and Accounting Guide* 2.40 at 25 (1994 ed.) ("The CAS contract clause . . . . requires amending the disclosure statement for any change in practices . . . ."); Trueger at 245-46 (section on "Amending of Disclosure Statements").

[32] Hughes definitized its subcontract on October 24, 1982, Pet. App. 42a, an act necessitating a formal avowal upon the DD-633 for the accepted proposal, J.A. 154, 200. "VI. COST ACCOUNTING STANDARDS BOARD (CASB) DATA (PUBLIC LAW 91 379 AS

The Department of Defense CAS Working Group promulgated a time standard in 1977 with the title that explains what was to be distinguished: "*Deliberate Noncompliance and Inadvertent Noncompliance*." Department of Defense CAS Working Group, Working Group Item 77-12 (Mar. 29, 1977)("*Deliberate Noncompliance*"), in *Cost Accounting Standards Guide (CCH)* para. 5990.12, at 6482 (1992). As a rough guide, when a contractor's commencement of practice, and disclosure, respect a sixty day line, the Working Group considers a problem "inadvertent"; however, worse than sixty days means "deliberate."[34] Compared to the DOD CAS Working Group's sixty days, Hughes' hiatus of nineteen months stands far, far out of line.

Moreover, what Hughes did fairly bristles with indicators cited by the DOD CAS Working Group as signs of deliberate, not inadvertent, noncompliance.[35] Nor does Hughes' CAS

AMENDED): . . . . HAVE YOU SUBMITTED A CASB DISCLOSURE STATEMENT (CASB DS 1 OR 2)? YES" J.A. 200.

[33] Hughes' noncompliance period consisted of the incredibly long nineteen months from Hughes' establishing by internal "agreement" on December 14, 1982 its accounting practice for the RDP project, Pet. App. 46a, until Hughes' CAS disclosure by submission on July 3, 1984. J.A. 111. Because the form covered the period to January 1984, that date is recited and used for many purposes. However, the CAS disclosure occurred when Hughes amended its form in July 1984, just as a tax form covers a period until December 31 but is filed March 15.

[34] "Voluntary changes in accounting practices should normally be considered deliberate noncompliances when they are implemented earlier than 60 days after the time the ACO [i.e., the Administrating Contracting Officer (ACO)] has received notice as provided in ASPR 3-1214." *Deliberate Noncompliance* at 6483. The emphasis is on formal notice of the kind that triggers auditor evaluation of the contractor's proposal, which Hughes did not give until July 1984.

[35] For example, Hughes does not plead the sign of "inadvertence" that "the noncompliance resulted from failure [of corporate] employees to follow company policy and instructions." *Deliberate Noncompliance* at 6482. Nor does Hughes plead the sign of inadvertence of a contractor's

disclosure violation concern some minor point. Hughes' practice concerned how to pool its direct costs and allocate them between contracts of different kinds: cost-reimbursement like the B-2, and fixed-price like the F-15. Because late disclosure games of the greatest variety are possible with such mixed contract types, that is the background against which a disclosure violation is the most serious. Moreover, Congress showed its concern with this matter of pools, as most seriously necessitating disclosure, in the statutory phrase immediately following the CAS disclosure condition: the condition requires contractors "to disclose in writing their cost-accounting principles, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs," § 2168(g), e.g., pools. Accordingly, the official CAS Disclosure Form, CASB-DS-1, emphasizes, too, the seriousness of the point upon which Hughes violated its disclosure duty.[36]

IV. THE DCAA AUDITORS WHO CRITICIZED HUGHES' CAS NONCOMPLIANCE DID NOT PREJUDICE THE JUDICIAL FALSE CLAIMS ACT CASE AGAINST HUGHES BY THEIR ACTIONS ON MERE ADMINISTRATIVE REMEDIES.

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formally-presented, good faith disagreement for which the period of noncompliance is simply the time necessary for resolution. *Id.* at 6483.

[36] That form has as one of its main parts, Part II, the disclosure of "Direct Costs" practices, under which "Labor" is, of course, one of the main categories and "Method" one of the main questions. What Hughes did not disclose was its resort to one of the non-usual methods for direct labor costs. For this, the form naturally has a special entry ("Y. Other") as distinct from the usual methods. *Compare* 37 Fed. Reg. 4139, 4151 (Feb. 29, 1972)(original promulgation of form) *with* J.A. 19 (Hughes' disclosure form)("Direct labor cost . . . is collected in a holding account and is allocated to contracts . . . .").

Although the Government did not prejudice the judicial FCA case against Hughes, Hughes argues that the Government did exactly that. Hughes employs two arguments, each without merit, drawing on the Government's mere administrative actions. First, it argues that when the government administratively released the suspended interim payments, it foreclosed a judicial false claims act remedy "[u]nder black-letter government contracts law." Pet. Br. 44 n.26 (citing J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993)).

Yet, the Government expressly reserved the issue of CAS noncompliance and false claims remedies when it ceased having the money temporarily withheld. J.A. 137.[37] Moreover, that passage hardly applies in this case, where the record shows only the end of a temporary withholding of funds, not a final settlement. Furthermore, Hughes' supposedly favorable "black-letter government contracts law" turns out to be black-letter government contracts law providing that Hughes remains subject to fraud claims, like this FCA suit, for even final settlements do not bar fraud claims.[38] The administrative

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[37] [T]he Government does not waive rights to a share in any settlement resulting from the parallel qui tam action in the event the relator's case is successful. Second, [an] associated issue of Cost Accounting Standards noncompliance is still open and shall remain so until resolved to Government satisfaction.

J.A. 137. This careful preservation received widespread publicity. An article, "Audits: DOD Release to Hughes Aircraft 15.4M in B2 Radar Funds; Related Qui Tam Suit Filed," BNA Fed. Cont. Rep., Jan. 27, 1992, describes the release of funds and the "two caveats: 1) the government does not waive rights to share in any settlement resulting from a parallel qui tam action; and 2) An associated cost accounting standards noncompliance issue is still open."

[38] The treatise cited by Hughes begins by saying, "Barring *fraud*, mistake, or lack of authority . . . ." Cibinic & Nash, at 1105 (emphasis supplied). That paragraph Hughes quoted as "black-letter" law continues as to what will bind the government "absent *fraud* . . . ." *Id.* (emphasis supplied)(quoting *James Graham Mfg. Co. v. United States*, 91 F. Supp. 715, 716 (N.D. Calif. 1950)). What Hughes refers to as its "black-letter" authority's "citing cases" includes *Leeds & Northrup Co. v. United States*, 101 F. Supp. 999 (E.D. Pa. 1951)(cited by Cibinic & Nash, at 1106), which discusses finality "in the absence of fraud." *Id.* at 1003.

action simply handled Hughes' attempt at having the matter heard in an administrative non-fraud forum. Hughes attempted this by submitting a claim to the contracting officer.[39] The administrative action taken in response to Hughes' claim keeps an FCA case perfectly available, even if the contracting officer made a final settlement, because "[a] contractor's fraud is of course a wholly different genus," not resolved by contracting officers, since "Congress . . . has given the federal courts power to hear and determine such cases." *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 16-17 (1972).

Second, Hughes jumbles together different administrative conclusions that the Court of Appeals had carefully separated. Once the auditors and the contracting officer made, and adhered to, their finding of Hughes CAS disclosure noncompliance, it became their duty to decide whether to trigger an administrative non-fraud proceeding as distinct from leaving the matter to a judicial FCA case. They did a cost-impact study.[40] Such a study does not use FCA judicial-type ques-

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[39] "Under the [Contract Disputes Act], the contracting officer's authority does not extend to `a claim or dispute for penalties or forfeitures prescribed by statute,' such as the FCA, that are within the jurisdiction of another agency. [Footnote citing 41 U.S.C. 605(a)(1982).] Moreover, the `agency head' may not pay or settle `any claim involving fraud.' [Footnote citing *Id.*]" Thomas P. Barletta & Barbara A. Pollack, *Civil Litigation of Allegations of Fraud in Connection with Government Contract Claims*, 18 Pub. Cont. L.J. 235, 248 (1988).

[40] It is the same type study as when contractors make a timely, proper disclosure of an intended change in practices or some other timely, proper CAS disclosure with no element of intentional concealment. Regarding cost-impact studies, see DCAAM, *supra*, 8-500; Cibinic & Nash, *supra*, at 1064-65.

tioning of witnesses for establishing the existence and impact of fraud.[41] That study left unprejudiced the FCA case.

CONCLUSION

Congress wrote the CAS Act, with disclosure as its ironclad "condition of contracting," to protect the great vulnerability of the Treasury to undisclosed accounting techniques of contractors, like Hughes, with their open access to the public till. Hughes' fiscally injurious violation of the express condition supports a False Claims Act case. The Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES TIEFER
(Counsel of Record)
Associate Professor
University of Baltimore School of Law
1420 North Charles Street
Baltimore, MD 21201
(301) 229-0112

Counsel for Amicus Curiae
Project on Government Oversight

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[41] By analogy, a contracting officer might decide to consider the cost-impact from a fraudulent product substitution not to be of the type for pursuing in an administrative remedy. Rather, she might decide to let proceed, instead, a successful False Claims Act proceeding. *See United States v. Aerodex, Inc.*, 469 F.2d at 1007.

Project On Government Oversight

REPORTS

Funds Returned to the United States Government By Defense Contractors and the Health Care Industry Under the False Claims Act, 1994-1996

January 1997

Danielle Brian
Director

2025 Eye Street, NW, Suite 1117, Washington, DC 20006-1903
(202) 466-5539 FAX (202) 466-5596

DEFENSE AND HEALTH CARE INDUSTRIES: RATHER THAN CLEAN UP THEIR ACT, THEY ATTACK THE ACT

The major trade associations for the defense and health care industries have risen up in support of the Hughes Aircraft Company -- the defendant in a pending fraud case before the Supreme Court. Hughes' appeal to the Supreme Court challenges the potency of the False Claims Act. This law, which was inspired by Civil War profiteering, has successfully forced those who defraud the government to pay for their illegal activities. It is not surprising that the defense and health care industries, which account for the overwhelming majority of False Claims Act settlements, are attacking this law.

In 1994, the Project On Government Oversight issued a report that found of the 22 defense contractors who were lobbying the Senate to water down the False Claims Act, 90% had been involved in fraud and abuse in government contracting practices themselves. At the time, those companies had paid over $500,000,000 in penalties and settlements to the government for their alleged fraudulent activities.

Now we see both the defense and the health care industries jumping on the opportunity to weaken this effective law. These associations are arguing in *amicus curiae* briefs to the Supreme Court that this law is being used to unfairly prosecute their members over "regulatory disputes."

The fact is, however, that just **since 1994, the health care industry has repaid the government over $1 billion**[1], **and the defense industry over $800,000,000, due to the False Claims Act.**

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[1] As our survey begins in 1994, this figure does not include some large settlements, such as the $100 million National Health Labs 1992 settlement, nor does it include the approximately $300 million settlement with Smith Kline Beecham expected to be announced by the end of 1996.

This survey is by necessity only a partial listing of settlements and judgements. Many False Claims Act settlements are not made public, and there is no comprehensive database that compiles information on those that are made public. The Project On Government Oversight has made every attempt to avoid duplicate listings of cases. The *qui tam* provision of the False Claims Act allows a person with knowledge of fraud to file a case on behalf of the government. Such cases are noted in the description of the settlements in this survey.

FUNDS RETURNED TO THE UNITED STATES GOVERNMENT BY DEFENSE CONTRACTORS UNDER THE FALSE CLAIMS ACT[2] 1994 - 1996

AGS Food Incorporated

$1.26 million to settle a *qui tam* suit alleging that the company falsified food costs, retained duplicate payments, misrepresented their intentions to pay the government and engaged in price fixing and kickbacks. The company sold commissaries on military bases in California. Defense Contract Litigation Reporter[3] March 24, 1994

Alliant TechSystems Incorporated and Accudyne Corporation

$12 million to settle a *qui tam* suit alleging that Accudyne failed to properly test electronic assemblies

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[2] A few of these cases did not involve defense contracts, but were settlements made by defense contractors who are members of either the Aerospace Industries Association, the Shipbuilders Council of America, National Security Industrial Association or the Electronic Industries Association. These associations have all filed *amici* briefs in *Hughes Aircraft Company v. U.S.* ex rel Schumer.

[3] Henceforth noted as DCLR.

supplied under an Army contract. Federal Contract Report[4] July 3, 1995

AT&T Incorporated

$13.9 million to settle allegations that the company did not provide accurate and complete pricing information on air traffic control equipment. FCR December 26, 1994

Austin Company

$4 million to settle a *qui tam* suit alleging that the company inflated contracts for designing government facilities to cover the cost of its employee pension plan. Department Of Justice[5] press release August 26, 1996

Battelle Memorial Institute

$330,000 to settle a *qui tam* suit alleging that the company used government owned equipment to service commercial customers. FCR June 10, 1996

BDM Federal Incorporated

$375,000 to settle allegations that the company improperly transferred funds from an Air Force contract. Richmond Times-Dispatch March 4, 1996

BEI Sensors and Systems

$1 million to settle a *qui tam* suit alleging that the company failed to properly test devices used to measure the gravitational pull on Air Force planes and pilots. DOJ press release December 6, 1995

[4] Henceforth noted as FCR.

[5] Henceforth noted as DOJ.

B.F. Goodrich Company

$552,500 to settle allegations that the company manufactured defective rafts for the Army. False Claims Act & Qui Tam Quarterly Review[6] October 1995

Boeing

$75 million to settle allegations that the company overcharged and mischarged military contracts. DCLR May 12, 1994

Computer Tape Source Incorporated

$146,000 to settle allegations that the company presented old computer tapes as new. Department Of Defense Inspector General Semi-Annual Report to Congress[7] October 1, 1993 - March 31, 1994

Dana Corporation

1. **$19.5 million** to partially settle allegations that the company overcharged parts sold to the Army, the Air Force and the Navy. FCR October 2 1995

2. **$10.2 million** to settle the remaining portion of the above settlement. This allegation pertained to the Beaver Precision Products division overcharging missile and aircraft parts. DOJ press release May 31, 1996

Deloitte & Touche, LLP

$396,000 to settle a *qui tam* suit alleging that the company submitted false claims in connection with

[6] Henceforth noted as QTQR.

[7] Henceforth noted as DOD IG SAR.

consulting contracts with the Bonnerville Power Administration and the DOJ. QTQR April 1996

DynCorp

$250,000 to settle a *qui tam* suit alleging that the company did not perform maintenance and other services at Fort Belvoir. DOD IG SAR October 1, 1994-March 31, 1995

Equipment And Supply Incorporated

$1.4 million to settle a *qui tam* suit alleging that the company's parts and services equipment did not meet contract specifications. DOJ press release December 15, 1994

Ethyl Corporation

$4.75 million to settle a *qui tam* suit alleging that the petroleum additives it sold companies for use in military vehicles did not meet military specifications or pass required testing. FCR April 29, 1996

Fairchild Industries

$8.2 million to settle a *qui tam* suit alleging that the company submitted false statements to the Air Force. DOD IG SAR October 1, 1994-March 31, 1995

FMC Corporation

$13 million to settle a *qui tam* suit alleging that the company inflated independent research and development and bid and proposal costs for the Bradley Fighting Vehicle and the M113 tank. DOJ press release October 8, 1996

General Dynamics Corporation

$1.8 million to settle a *qui tam* suit alleging that the company overbilled F-16 testing. QTQR April 1995

General Electric Company

1. **$7.1 million** to settle a *qui tam* suit alleging that the company failed to satisfy electrical bonding requirements for its jet engine contracts, thereby creating a safety risk. FCR August 14,1995

2. **$5.87 million** paid by GE and Martin Marietta, to settle a *qui tam* suit associated with improper sales of radar system to Egypt. DCLR January 26, 1995

Grumman Corporation

$2.2 million to settle allegations that a former Grumman Data Systems vice-president knowingly overstated the cost of installing a supercomputer for NASA. This settlement was in addition to a previous partial settlement of **$1.1 million**. FCR July 11, 1994

GTE

1. **$3.25 million** to settle allegations that the company improperly increased overhead rates. DCLR March 10 1994

2. **$3.2 million** paid by GTE Government Systems Corporation and Canadian Marconi Corporation, to settle a *qui tam* suit alleging that the company did not inform the Army concerning radios that did not meet requirements. FCR July 17, 1995

Harris Corporation

1. **$1.6 million** to settle allegations that it improperly obtained confidential information to win a contract with the Federal Emergency Management Agency. DOJ press release June 21, 1995

2. **$1.5 million** to settle allegations that it overestimated labor costs in a Navy contract. FCR May 8, 1995

Hughes Aircraft Company, Incorporated

$4.05 million to settle a *qui tam* suit alleging that the company failed to perform tests on electronic equipment for the military. DOJ press release September 10, 1996

Infotec

$1.3 million paid by company and CEO Fernando Niebla to settle allegations that the company made false statements to receive an Air Force contract. Boston Herald July 30, 1996

Israel Aircraft Industries Ltd.

$8.5 million (plus interest) to settle allegations that the company knowingly submitted false cost data in negotiating several Navy contracts. FCR July 24, 1995

Korry Electronics

$250,000 to settle allegations that the company made unauthorized design changes on switches for the Defense Department. DCLR May 12, 1994

Litton Industries

$82 million to settle a *qui tam* suit alleging commercial data processing costs were passed on to the government. FCR July 18, 1994

Lockheed

1. **$6.3 million** to settle allegations that the company withheld cost information that inflated the contract price. FCR December 26, 1994

2. **$500,000** to settle allegations that Randtron Systems Incorporated, a unit of Lockheed, did not give the government relevant information that would have lowered the price of military contracts for radar antennas. DOJ press release October 18, 1996

Lucas Industries

$88 million to settle a *qui tam* suit alleging defective parts and falsification of data for the Navy's F/A-18. FCR October 9, 1995

Martin Marietta

See second listing under GE.

Monroe Wire and Cable Corporation

$532,000 to settle allegations that the company's cable did not meet specifications. DOD IG SAR October 1, 1993-March 31, 1994

Parker-Hannifin

$7.8 million to settle allegations of mischarging and defective pricing, as well as misrepresentations in their submission to the DOD Voluntary Disclosure Program. DOJ press release September 15, 1994

Parsons Engineering

$3.2 million to settle a *qui tam* suit alleging the company overcharged on labor costs for environmental surveys and similar services at Brooks Air Force Base, TX. FCR October 16, 1995

Philips Electronics North America Corporation

$65.3 million settlement for selling improperly tested capacitors and resistors for a number of military and aerospace programs. This amount includes the **$9.6 million** submitted by Philips in 1992 through the DOD Voluntary Disclosure Program. DOJ press release February 26, 1996

Pneumo Abex Corporation

$12.5 million to settle allegations that the company mischarged labor costs. DOJ press release January 2, 1996

PRC

$72,500 to settle a *qui tam* suit alleging that the company falsely billed the Commerce Department for equipment that was not delivered. FCR May 23, 1994

Richardson Electronics

$4.7 million to settle allegations that it falsely stated it could manufacture night vision military equipment and passed off another company's equipment as its own. DOJ press release June 1, 1995

Rockwell International Corporation

$27 million to settle allegations that the company did not provide accurate, complete, and current information involving the B1-Bomber. FCR August 7, 1995

Raytheon

$4 million to settle allegations the company inflated missile detection site contract prices. FCR November 11, 1994

Science Applications International Corporation

1. **$2.5 million** to settle a *qui tam* suit alleging that Science Applications International Technology failed to perform its contract and misled the Air Force about its work. FCR December 25, 1995

2. **$230,000** paid by Science Applications International Corporation, AlliedSignal Technical Services Corporation and Lloyd Electric Company to settle allegations that they improperly tested electric cables. DOJ press release May 10, 1995

SL Industries and SL Auburn Incorporated

$600,000 to settle a *qui tam* suit alleging that the companies produced defective and substandard aircraft and tank engine igniters. FCR December 4, 1995

SMTEK Incorporated

$200,000 to settle a *qui tam* suit alleging that the company falsely represented its capability to test space station components. FCR June 5, 1995

Support Systems Associates, Incorporated

$400,000 to settle allegations of cost mischarging including cross-charging labor hours and billing for services not provided. DOD IG SAR April 1, 1994-September 3, 1994

Systems Engineering and Management Associates Incorporated

$765,000 to settle a *qui tam* suit alleging that the company overcharged for labor and overhead. FCR August 15, 1994

Teledyne Industries Incorporated

1. **$85 million** to settle a *qui tam* suit alleging the Teledyne Relays division falsely certified relay switches sold to the U.S. military. DCLR April 28, 1994
2. **$27.5 million** to settle a *qui tam* suit alleging Teledyne Systems arbitrarily inflated cost data and represented it as current, accurate, and complete. DCLR April 28, 1994
3. **$5.65 million** to settle a *qui tam* suit alleging the company charged the government for nonproductive time and did not properly test "identification friend or foe" systems for military aircraft. FCR October 24, 1994
4. **$2 million** to settle a *qui tam* suit alleging that the company improperly tested and failed to calibrate test equipment in manufacturing "identification friend or foe" components for the Air Force. FCR November 13, 1995
5. **$850,000** to settle a *qui tam* suit alleging defective pricing when the company charged the government for less costly equipment that the company already had in stock. DOJ press release November 10, 1994
6. **$500,000** to settle allegations that Teledyne Electronics substituted parts and failed to perform required tests in connection with radar test sets supplied to the Army. DOJ press release December 6, 1994

TRW Incorporated

$29 million to settle allegations of mischarging labor costs on military subcontracts. DCLR May 12, 1994

United Technologies

$150 million to settle a *qui tam* suit alleging that its Sikorsky Aircraft Division prematurely billed work not yet performed on a helicopter contract with the U.S. military. This settlement followed an allegedly inadequate DOD voluntary disclosure. DCR April 14, 1994

Varo Incorporated (Imo Industries Incorporated)

$2 million to settle a *qui tam* suit alleging that Varo, its Ni-Tec division and Optic Electronic Corporation delivered night vision equipment components for the Army that did not meet reliability and testing requirements. DOJ press release July 18, 1996.

Westinghouse Electric Corporation

$1.88 million to settle allegations that the company did not tell the Air Force about other sales of spare parts that should have lowered the unit cost. This amount includes the $258,030 paid to the Air Force under the DOD Voluntary Disclosure Program. DOJ press release December 12, 1994

FUNDS RETURNED TO THE UNITED STATES TREASURY BY THE HEALTH CARE INDUSTRY UNDER THE FALSE CLAIMS ACT 1994-1996

HOSPITALS AND OTHER HEALTH CARE PROVIDERS

Caremark Incorporated

$141 million civil and $20 million criminal settlement for alleged kickbacks and fraud in its home infusion, oncology, hemophilia and human growth hormone businesses. Payments were allegedly made to doctors to refer patients to the company. U.S. Attorney, Southern District of Ohio press release April 22, 1996

Charter Westbrook Behavioral Health Systems Incorporated - Virginia

$2 million to settle a *qui tam* suit alleging improper compensation to physicians for referrals. DOD IG SAR October 1 94-March 31 95

CHR Claridge House - Florida

$415,000 for allegedly improperly billing the government for medical supplies in treatment of CHR residents using a third party billing agent, Handle With Care. Settlement Agreement March 27, 1995

Clinical Practices of the University of Pennsylvania

$30 million settlement for alleged inadequate documentation and false Medicare billings by attending physicians for services performed by residents in training. QTQR January 1996

First American Health Care of Georgia

$20 million of a **$255 million** settlement for overbilled and fraudulent Medicare claims by the home

health care company. DOJ press release October 18, 1996

Florida Club Care Center

$245,488 for allegedly submitting claims for supplies used by residents that had not been used, also using Handle With Care as the billing agent. DOJ press release June 23, 1995

GMS Management-Tucker, Incorporated et al.

$600,000 settlement for allegedly not providing adequate nutritional or wound care needs to their nursing home residents, yet billing for these services to Medicaid and Medicare. QTQR July 1996

Health Care Capital, Central Park Lodges, Health Resources Northwest

$2.2 million to settle allegations that these three companies that manage nursing homes and nursing facilities submitted false Medicare bills for supplies. DOJ press release December 1, 1995

Mt. Sinai Medical Center of Cleveland

$472,000 for allegedly resubmitting Medicare claims for blood work under new codes after having been denied reimbursement for them. DOJ Health Care Fraud Report[8] FY 94.

National Medical Enterprises

$324 million civil settlement for allegedly paying kickbacks for patient referrals and providing unnecessary treatment at psychiatric hospitals in 30 states. **Criminal fines and penalties totalled $53 million.** Settlement Agreement June 29, 1994

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[8] Henceforth noted as DOJ HCFR.

Northwestern Institute of Psychiatry (Matrix Health Management)

$1.4 million for allegedly referring railroad employees for unnecessary drug and alcohol treatment and paying kickbacks to a firm that recruited patients. DOJ HCFR FY94

"Ohio Hospital Project"

$6.6 million settlement by 17 Ohio hospitals for allegedly billing Medicare and Medicaid for individual blood tests even though they were performed in "bundles" on automated machines. Cleveland Plain Dealer, Dec. 4, 1996

Park Medical Center - Ohio

$1.45 million settlement for allegedly billing Medicare and Medicaid for geriatric psychiatric services that were not reasonable or necessary. QTQR October 1996

Pineville Community Hospital Association, Incorporated et al. - Kentucky

$2.5 million to settle a *qui tam* suit alleging fraudulent billing by a hospital association and two doctors, over a ten year period, for work not performed. QTQR July 1995

Respro - Kentucky

$90,000 for allegedly participating in a scheme to increase the volume of Medicare claims so it could boost reimbursements to itself. DOJ press release Sept. 29, 1994

"72 Hour Rule" Investigation

$3.4 million settlement paid by 83 Massachusetts hospitals for alleged duplicate billing to Medicare.

Massachusetts General Hospital paid the highest fine --**$400,000.** This settlement is part of an ongoing nationwide government probe into Medicare outpatient billing practices. DOJ press release May 22, 1996

Sterling Medical Associates -Ohio

$700,000 to settle a *qui tam* suit alleging Sterling, a provider of civilian physicians to military hospitals, misrepresented the size of the company to obtain federal small business contracts. Government Contract Litigation Reporter, Jan. 4, 1996

Sutter Memorial Hospital - California

$1.265 million to settle a *qui tam* suit alleging improper billing for cardiac device implant procedures not covered by Medicare. Part of ongoing *qui tam* suit against 130 hospitals for improperly charging Medicare for experimental medical devices. DOJ press release February 14, 1996

T2 Georgia

$500,000 from national provider of outpatient and home infusion therapy for allegedly offering stock options to physicians in exchange for referrals. DOJ press release Sept. 26, 1994

Thomas Jefferson University and the Jefferson Faculty Foundation - Pennsylvania

$12 million settlement for alleged inadequate documentation and billings by attending physicians when residents actually performed the services. QTQR October 1996

U.S. HomeCare Corporation

$650,000 to settle a *qui tam* suit alleging submission of false Medicare claims, and inadequate

documentation including forged nurses signatures and "canned" nursing notes in their Miami operations. QTQR July 1995

MEDICAL EQUIPMENT AND DRUGS

Advanced Care Associates, Incorporated et al.

$4.03 million to settle a *qui tam* suit for allegedly falsifying documents on the medical condition of Medicare beneficiaries to obtain reimbursement for lymphedema pumps. DOJ press release June 19, 1996

Becton Dickinson & Company

$3.3 million to settle a *qui tam* suit for allegedly overcharging the Department of Veterans Affairs for medical equipment for microbiological tests. DOJ press release June 19, 1995

Circa Pharmaceutical Incorporated

$2.7 million settlement for allegedly selling untested generic drugs to Medicare, Medicaid, and the Department of Veterans Affairs. DOJ press release March 28, 1996

Curative Industries Incorporated, UltraMed Incorporated

$2.1 million to settle a *qui tam* suit for allegedly submitting Medicare claims for lymphedema pumps that did not meet engineering requirements. DOJ HCFR FY94

Huntleigh Technology

$4.9 million to settle a *qui tam* suit alleging false representations to dealers and suppliers that it qualified for Medicare's highest reimbursement rate for their lymphedema pump, causing the dealers and suppliers to

submit false claims for reimbursement. Settlement Agreement, July 24, 1995

Medline Industries

$6.4 million to settle a *qui tam* suit for alleged submission of thousands of false invoices for health care products, equipment and supplies to the Department of Veterans Affairs. Medline failed to disclose that certain of its items were manufactured in non-designated countries. QTQR July 1996

Modern Wholesale Drug Midwest, Incorporated (Rugby Laboratories)

$7.5 million to settle a *qui tam* suit for allegedly overcharging Department of Veterans Affairs for generic drugs. DOJ press release, October 31, 1995

National Medical Systems

$1.5 million to settle a *qui tam* suit for alleged billing of Medicare for top-of-the-line lymphedema pumps when it actually provided much cheaper equipment. Settlement Agreement, September 29, 1995

Shiley Incorporated, Pfizer Incorporated

$10.75 million settlement for alleged false claims on potentially fatal artificial heart valves. FDA approval of the valves was based on false statements. DOJ HCFR FY94

Summit Healthcare Systems, Incorporated and Global Medical Systems, Incorporated

$500,000 for allegedly overbilling Medicare by as much as 700% for durable medical equipment. DOJ press release June 11, 1996

Superior Surgical Manufacturing Co., Incorporated

$6.5 million settlement for allegedly overcharging the Department of Veterans Affairs, the General Services Administration and other agencies for medical and clothing items. **Superior pled guilty to a one-count felony information.** QTQR July 1996

United States Surgical Corporation

$10 million settlement for alleged failure to disclose accurate and complete pricing information to government negotiators for surgical instruments. DOJ press release December 7, 1995

MEDICAL LABORATORIES

Allied Clinical Laboratories, Incorporated

$4.9 million to settle a *qui tam* suit for alleged false claims for Medicare reimbursement of laboratory tests to Medicare. DOJ press release March 20, 1995

Corning Clinical Laboratories Incorporated

1. **Damon Clinical Laboratories, Incorporated**

   $84 million to settle a *qui tam* suit and **$35 million criminal fine** for allegedly manipulating doctors to order blood tests that were not medically necessary and improperly billing the tests to Medicare. Damon is currently owned by Corning Clinical Laboratories. DOJ press release October 9, 1996

2. **Metpath Incorporated**

   $8.6 million to settle a *qui tam* suit for allegedly submitting claims to Medicare and Medicaid for lab tests not performed. Metpath is owned by Corning Clinical Laboratories. QTQR July 1995

3. **Metpath Incorporated**

   $7 million to settle a *qui tam* suit (along with $4 million by Unilab Corp.) for allegedly billing for certain blood tests that were not ordered or medically necessary. QTQR October 1996

4. **Bioran**

   $6.675 million settlement for allegedly manipulating doctors into receiving medically unnecessary tests whenever doctors ordered simple blood tests. These were then improperly billed to Medicare. Bioran is owned by Corning Clinical Laboratories. Settlement Agreement Feb. 1996

Laboratory Corporation of America

$182 million *qui tam* settlement, plus a **criminal fine of $5 million**, for allegedly billing Medicare for lab tests that were not performed, or that had not been requested by physicians. DOJ press release, November 21, 1996

Unilab Corporation

$4 million to settle a *qui tam* suit (along with $7 million by Metpath Incorporated) for allegedly billing for certain blood tests that were not ordered or medically necessary. QTQR October 1996

RESEARCH COLLEGES AND UNIVERSITIES

The Board of Trustees of the University of Alabama et al.

$1.66 million judgement in *qui tam* case for false representations on grant proposals and progress reports to NIH. QTQR July 1995

Henry M. Jackson Foundation for the Advancement of Military Medicine

$45,920 to settle a *qui tam* suit for alleged mischarging labor, training and research costs not covered in NIH contract for radiology services. QTQR July 1995

University of Utah, University of California and Dr. Ninneman

$1.6 million to settle a *qui tam* suit alleging the two Universities ($950,000 paid by University of Utah and $625,000 paid by University of California) knowingly allowed Dr. Ninneman to falsely report research results to NIH. DOJ HCFR FY94

AMBULANCE SERVICES

Crescent City EMS, Inc - Louisiana

$1.86 million to settle a *qui tam* suit alleging billing for ambulance service for Medicare dialysis patients who they claimed as being confined to bed when they could actually walk. DOJ HCFR FY94

Fire Protection District No. 5, Mason County et al. - Washington State

$160,000 to settle a *qui tam* suit alleging fraudulent billing for ambulance services. QTQR July 1996

Health Careers, Incorporated et al.

$12 million settlement for allegedly billing for ambulance services for Medicare beneficiaries when they were in fact transported in passenger vans, as well as billing for patients whose medical condition did not require transportation by ambulance. Settlement Agreement April 25,1996

Professional Ambulance Service Incorporated, L&M Ambulance Corporation and Trinity Ambulance Corporation of Connecticut

$700,000 settlement by three ambulance companies for allegedly billing Medicare for unnecessary services. DOJ press release December 18, 1996

INSURANCE PROVIDERS

Blue Cross Blue Shield of Florida

$10 million to settle a *qui tam* suit alleging mishandling of claims and knowingly choosing a data processing firm that could not handle the claims volume. DOJ HCFR FY94

Blue Cross Blue Shield of Massachusetts

$2.75 million to settle a *qui tam* suit for allegedly submitting false Medicare reports.

Blue Cross Blue Shield of Michigan

1. **$27.6 million** to settle a *qui tam* suit alleging improper billing and submitting false documentation to Medicare, and inadequate audits of hospital cost reports. DOJ Press release January 18, 1995
2. **$24 million** settlement for unlawfully billing Medicare for thousands of claims that should have been paid from private insurance funds. DOJ press release January 18, 1995.

Provident Accident Life and Accident Insurance Co.

$27 million to settle a *qui tam* suit for alleged false Medicare billing. National Health Lawyers News Report, May 96.

PHYSICIANS

Dr. Anthony et al. - Ohio

$1.52 million *qui tam* settlement by nine physicians and their medical imaging corporations for alleged improper Medicare and Medicaid referrals to diagnostic firms in which the doctors had a financial interest. QTQR July 1995

Dr. Marlou Davis - Missouri

$4.1 million judgement for soliciting elderly patients from nursing homes, supermarkets, malls and drug stores and promising them early detections of illnesses including heart disease and strokes. He then charged Medicare for the tests. BNA Medicare Report October 25, 1996

Dr. Jaramillo, Medical Institute for Mental Health, and Memorial Hospital - New Mexico

$700,000 to settle a *qui tam* suit alleging billing Medicare, Medicaid and CHAMPUS for psychiatric services that were not provided or were provided by a non-physician assistant without appropriate supervision. QTQR July 1996

Dr. Schwartz, Dr. Barr & Dr. Silver et al. - Washington, DC

$278,800 to settle a *qui tam* suit against group of doctors for allegedly billing for chemotherapy treatment even though the treatment was provided by nurses, and no doctors were present at the hospital at the time of treatment. DOJ press release, July 24, 1996

Dr. Schwartzman, MD and The Brooklyn Hospital Center - New York

$875,000 settlement to settle a *qui tam* suit ($25,000 by Dr. Schwartzman personally) for alleged false claims of having performed full medical exams on Social Security Administration disability applicants, when in fact only brief interviews were performed. QTQR January 1996

Dr. Wurtzel, MD and Life Centers Limited - Pennsylvania

$500,000 paid by physician/owner of mental health clinic to settle a *qui tam* suit for allegedly fraudulently charging Medicaid for services never performed or otherwise not reimbursable. QTQR January 1996